PRUDENTIAL MALL LTD.

v.

P.H. SHEK LTD. & ANOR.

PRIVY COUNCIL (ON APPEAL FROM THE COURT OF APPEAL, HONG KONG)
LORD TEMPLEMAN
LORD BRIDGE OF HARWICH
LORD ACKNER
LORD LOWRY
LORD SLYNN OF HADLEY
[PRIVY COUNCIL APPEAL NO. 11 OF 1991]
8 JUNE 1992

CIVIL PROCEDURE: *Cost - Whether notice of payment into Court with defects nullifies proceedings as to cost - Whether discretion of Judge remained even if there were defects in the notice of payment-in.*

By way of an agreement dated 18 December 1982, the appellant (landlord) let out certain premises to the respondent (tenant). The respondent breached the agreement and the appellant by a statement of claim dated 14 August 1987, (amended on 3 June 1988) claimed possession of the premises together with mesne profits and certain fees and charges. The respondents denied the right to forfeit and in the alternative claimed relief from forfeiture. On 11 September 1987, the respondents were ordered to make interim payments on account of liability for continued use and occupation of the premises until final judgment. On 19 August 1988, it was ordered that the appellants recover possession, the respondents to pay damages, which is to be assessed and cost. The respondents vacated the premises on 12 October 1988, and made interim payment to the appellants in respect of the amounts provided for in the lease. Damages remained to be assessed. The initial claim of mesne profits amounting to HK$169,290 per month was covered by the interim payment. On 3 June 1988, the appellants amended the claim for income profits to a sum of HK$515,000 per month. This was in excess of the interim payment made. On 2 July 1981, the respondents gave notice of payment into Court a sum of HK$3,750,000 in satisfaction of the cause of action of the appellant after taking into account the respondents counterclaim. On 28 February 1989, HK$5,762,826.67 was assessed as the sum to be paid as damages. This did not take into account the interim payment made amounting to HK$2,919,797. This order was set aside and it was accepted that HK$2,843,029.26 was the net sum due. The sum was less than the amount paid into Court. The appellants contended, on the hearing as to cost, that the respondents are not entitled to their costs for not complying with O. 22 r. 1, which required the notice of payment to state that the interim payment was taken into account. The trial Judge took the view that the notice of payment-in with defects cannot be a proper matter for considering the question of costs. The Court of Appeal took the view that the trial Judge did not judicially exercise his discretion.

Held:

[1] The defects in the notice did not preclude the respondents from relying on the payment-in so far as to justify a claim for costs.

[2] By O. 2 r. 1 of the Rules of Supreme Court a failure to comply with the rules "shall be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings, or any document, judgment or order therein." The trial Judge did not remind himself of this.

[3] The trial Judge did not give due weight to a number of factors in exercising his discretion, a discretion which remained even if, there were defects in the notice of payment-in.

[4] The appellants recognised that their claim was for the balance of damages assessed less the interim payments which were made. There is no justification to regard the sum so paid in as an amount not having taken into account the interim payments.

[Appeal dismissed. Appellants to pay respondent's costs before the Board.]

Cases referred to:
Scherer v. Counting Instruments Ltd. [1986] 1 WLR 615 ***(cit)***
Bankamerica Finance Ltd. v. Nock [1988] AC 1002 ***(cit)***
Donald Campbell and Co. Ltd. v. Pollak [1927] AC 732 ***(cit)***

Legislation referred to:
Rules of the Supreme Court [HK], O. 2 r. 1, O. 22 r. 1(1), (4), O. 29 r. 16, O. 62 rr. 3, 5
Supreme Court Ordinance [HK], s. 14(3)

JUDGMENT

Lord Slynn of Hadley:

This appeal, by leave of the Court of Appeal of Hong Kong, concerns the costs of proceedings, in the Supreme Court of Hong Kong, to assess damages in respect of the use and occupation of certain premises by the respondents. The respondents were ordered to pay all the costs of those proceedings by the trial Judge; the Court of Appeal reversed that order and ordered that the costs of the assessment, of the hearing as to costs (apart from one day) and of the appeal should be paid by the appellants to the respondents.

The dispute arose out of a tenancy agreement dated 18 December 1982 by which The Prudential Enterprise Ltd. as landlords let certain premises forming part of the Prudential Centre 216-228A Nathan Road, Kowloon, Hong Kong to the respondents as tenants for a term of seven years from 18 December 1982 to 17 December 1989. The premises were assigned by The Prudential Enterprise Ltd. to the appellants by an assignment dated 10 March 1987.

By Section VI, Clause 19 of the tenancy agreement the respondents covenanted not to assign, underlet or part with possession of the premises or to enter into an arrangement whereby any person not a party to the agreement obtained the use, possession or occupation of the premises; breach of such clause entitled the landlords to re-enter the premises whereupon the tenancy agreement came to an end.

By a statement of claim dated 14 August 1987, as subsequently amended on 3 June 1988, the appellants claimed possession of the premises on the basis that the respondents were in breach of Clause 19 by virtue of an assignment or arrangement under which Jardine Matheson & Co. Ltd. were in possession of the premises, together with mesne profits and certain fees and charges in respect of the premises. The respondents denied the appellants' right to forfeit the lease and in the alternative claimed relief from forfeiture.

By orders dated 11 September 1987 and 31 May 1988 the respondents were ordered to make interim payments on account of their liability in respect of the use and occupation of the premises until final judgment in the proceedings. On 19 August 1988 Mr. Justice Rhind ordered that the appellants recover possession of the premises, relief from forfeiture being refused, and that the respondents pay damages to be assessed. The costs of those proceedings were awarded to the appellants and are not in issue in this appeal.

The respondents vacated the premises on 12 October 1988. Interim payments were made by them to the appellants pursuant to the aforesaid orders in respect of the period from 14 August 1987 to 12 October 1988 in the amounts provided for in the lease. The other charges and rates were also paid by the respondents to the appellants before the hearing to assess damages.

By its claim as originally pleaded, the appellants sought mesne profits at the monthly rate of HK$169,290. The interim payments made by the respondents covered this claim. However by amendment of 3 June 1988 the appellants increased the claim for mesne profits to the monthly rate of HK$515,000, a sum in excess of that ordered to be paid as an interim payment. The appellants stated that they "will claim the mesne profits, fees and charges as pleaded in the prayer herein, less any interim payments made by the (respondents) and accepted by the (appellants)".

Following this amendment on 2 July 1988, the respondents gave notice that they had paid HK$3,750,000 into Court "in satisfaction of the cause of action in respect of which the 1st and 2nd plaintiffs claim and after taking into account and satisfying the above-named 1st and 2nd defendants' cause of action in respect of which they counterclaim".

On 28 February 1989 after an eight day hearing, Mr. Justice Liu assessed damages at HK$5,762,826.67 and adjudged that the respondents pay that sum to the appellants. That sum did not, however, take into account the amounts paid by way of interim payments amounting to HK$2,919,797. The order of 28 February 1989 was accordingly set aside, it being accepted that the net sum due on the basis of the assessment was HK$2,843,029.26, a sum less than the amount of HK$3,750,000 paid into Court. An order for payment of the net sum, out of the sum in Court, was made on 23 June 1989.

The appellants contended before Mr. Justice Liu, on the hearing as to costs, that because of defects in the notice of payment-in the respondents were not entitled to their costs. In the first place they relied on O. 29 r. 16 of the Rules of the Supreme Court which provides:

> Where, after making an interim payment, whether voluntarily or pursuant to an order, a defendant pays a sum of money into Court under O. 22 r. 1, the notice of payment must state that the defendant has taken into account the interim payment.

It was said that, since the notice of payment did not state this, the respondents had deliberately chosen to ignore the interim payments.

The appellants then contended that the notice did not comply with O. 22 r. 1(1) and (4). The latter provides that:

> Where two or more causes of action are joined in the action and money is paid into Court under this rule in respect of all, or some only of, those causes of action, the notice of payment:
>
> (a) must state that the money is paid in respect of all those causes of action or, as the case may be, must specify the cause or causes of action in respect of which the payment is made ...

Here it was said that the notice did not specify in respect of which causes of action the payment was made. Moreover, since "the cause of action" referred to in the notice of payment-in could be read as meaning all the causes of action, it was invalid since a payment-in could only be made in respect of a money claim.

The learned Judge took the view that, since the notice did not state that the respondents had taken into account the interim payments, "the amount of HK$3.75m paid in is conspicuously a sum from which no interim payments have been discounted. There is every justification for the plaintiffs (appellants) to regard the sum so paid in as an amount not having taken into account the ordered interim payments".

He went on: "Payment into Court or interim payment forms part of a special procedural machinery in our Civil Code. A sum must be properly brought into Court in accordance with the rules to achieve the desired result of removing judicial discretion as to costs. ... No consequence would ensure to the defendants' benefit unless the procedural machinery is properly put to use. ... If a defendant does not observe the rules, he cannot take advantage of his unexpressed intention of taking into account an interim payment. Unless he follows the rules, he cannot disrupt the usual incidence of costs".

He was of the view that "the cause of action" was the substantive cause of action in ejectment. If the notice was to be construed as referring to that, it was invalid since there could be no payment-in in respect of such a claim. If the notice was to be construed as referring to all the claims in the proceedings, it was defective in that it did not identify to which of the claims the payment related. The Judge continued:

> I am inclined to the view that a payment-in on a notice with the defects discussed is invalid for the purposes of O. 22 r. 1 and that consequently the HK$3.75m cannot be a proper matter for considering the question of costs. ...
>
> For the various obscurities in the notice I have endeavoured to enumerate, the 2nd plaintiff could not be reasonably expected to even seriously consider accepting the sum so paid in. It would be quite futile for the 2nd plaintiff to try to make a fair judgment as regards adequacy, having to speculate on the amount in the lump sum attributable to the claim for mesne profits. A payment-in of the nature and in the form made in this case could not be, for these reasons, a material factor for considering the question of costs.
>
> Therefore, I need express no concluded view on the validity of the payment brought into Court in this case.
>
> In my judgment, the defendants' notice of payment into Court does not have and cannot, in all the circumstances, be given the effect of taking into account the interim payments. Thus, the award clearly exceeds the amount brought into Court. In any event, therefore, the notice cannot assist the defendants.

In so far as the award of costs is concerned, O. 62 r. 3 provides that if the Court in the exercise of its discretion sees fit to make any order as to costs, the Court shall "order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs". By O. 62 r. 5:

> The Court in exercising its discretion as to costs shall, to such extent, if any, as may be appropriate in the circumstances, take into account ...
>
> (b) any payment of money into Court and the amount of such payment;

By s. 14(3) of the Supreme Court Ordinance:

> No appeal shall lie:
>
> (e) without the leave of the Court or tribunal in question or of the Court of Appeal, from an order of the High Court ... relating only to costs which are by law left to the discretion of the Court or tribunal.

In this case neither the Judge nor the Court of Appeal was asked for leave to appeal though it seems clear that the latter, if asked, would have given leave. The Court of Appeal was content to proceed on the basis of *Scherer v. Counting Instruments Ltd.* [1986] 1 WLR 615 as approved by the House of Lords in *Bankamerica Finance Ltd. v. Nock* [1988] AC 1002 and in particular on the principle that "if, however, he (that is the Judge below) has made his order having no relevant grounds available or having in fact acted on extraneous grounds, this Court can entertain an appeal without leave and can make what order it thinks fit".

The Court of Appeal took into account that:

(a) any reference in the notice of payment in to a claim other than a monetary claim was immaterial;
(b) the only remaining issue between the parties at the time of payment-in was the claim for mesne profits and
(c) the only conclusion to which anyone, properly applying his mind, could come would be that the interim payments had already been taken into account. As the Vice-President, Sir Derek Cons put it, the other Judges of appeal agreeing with his reasons:

> I accept, at any rate for the purposes of this appeal, that failure in the formal notice [to make] a reference to the interim payments would preclude the defendants from relying on any entitlement that would otherwise be given by O. 62 r. 5(b). The order for costs would be at large in the discretion of the Judge, having regard to all the circumstances of the case, including those relating to the payment-in. As to that, if I understand the judgment correctly, the Judge felt that the defects of the notice were so great that it was not worthy of serious consideration by the plaintiff and therefore not a factor to be considered in the exercise of his discretion. He does not appear to have considered the factors I have mentioned, and in particular that one to which I attach great importance, namely the wording of para. 10 of the statement of claim. Instead he appears to have considered the failure to comply with the formal requirements of r. 16 as in itself decisive. For that reason he has not, in my view, judicially exercised his discretion.

On this appeal it is said that the Court of Appeal had no jurisdiction to substitute its discretion as to costs for that of the trial Judge and that this raised a point of law on which the Board can and should hear the appeal. It falls under the principle stated by Viscount Cave LC, in *Donald Campbell & Co. Ltd. v. Pollak* [1927] AC 732 at p. 747:

> (3) that when it is alleged that the Court of Appeal in dealing with costs has fallen into an error on a point of law which governs or affects costs an appeal on that question will be heard.

In their Lordships' view the argument put forward in this case does fall within that principle. The question, however, is whether the argument is right.

In their Lordships' view it is not right to say that the trial Judge failed to consider the three factors to which the Court of Appeal attached importance and which have been mentioned. He accepted that payments - in could only be made in respect of money claims and that at the time of payment-in the only outstanding claim was the damages claim. He also considered the question whether the notice of payment-in should be read as having taken into account the interim payment. To that extent the appellants are right.

They are also entitled to say that the Judge was right in finding that the notice of payment-in was defective in that it failed to state that the respondents had taken into account the interim payments contrary to O. 29 r. 16, and technically, that since there were several causes of action joined in the action it was not specified that the money was paid in respect of the mesne profits claim alone.

On the other hand the Judge appears to have taken the view that the defects in the notice precluded the respondents from relying on the payment-in so as to justify a claim for costs. He did not remind himself that by O. 2 r. 1 of the Rules of the Supreme Court a failure to comply with the rules "shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein". Nor in their Lordships' opinion did the Judge give due weight to a number of factors which he ought to have taken into account in exercising his discretion as to costs, a discretion which remained even if there were defects in the notice of payment-in.

In the first place the appellants' claim with effect from 3 June 1988 was for mesne profits, fees and charges, as pleaded in the prayer "less any interim payments made by the defendants and accepted by the plaintiffs". The appellants thus recognised that their claim was for and could only be for the balance of damages assessed less the interim payments which were made.

Secondly, the notice of payment was stated to be "in satisfaction of the cause of action in respect of which the first and second plaintiffs claim". It could, in so far as concerned damages, thus relate only to the balance between the damages assessed and the interim payments made. It seems to their Lordships quite impossible to say that the appellants could reasonably be in any doubt as to this or as to the fact that the payment-in could relate only to the money claim. It could not possibly have any relevance to the claim for possession or to the counterclaim for relief from forfeiture. The wording of the notice of payment-in, like the respondents' solicitors' failure to reply to the letter asking for clarification of the notice of payment-in, may have been unfortunate, but reasonably looked at only one conclusion could be drawn from the payment-in. It clearly related to the money claim less the interim payments and to that alone.

It seems to their Lordships to be a *non sequitur* to say that when the notice of payment-in does not state that the defendants have taken into account the interim payments, the sum paid in is "conspicuously" one from which no interim payments have been discounted. Far from there being "every justification" it seems to their Lordships that there was no justification "for the plaintiffs to regard the sum so paid in as an amount not having taken into account the ordered interim payments". If the payment-in had ignored the interim payments (that is, was in respect of the gross claim) the plaintiffs could both have kept the interim payments and taken out the gross sum which would obviously have been wrong.

The matter becomes, in their Lordships' view, even clearer as time goes on. The judgment of Mr. Justice Rhind on 22 August 1988 decided the claim for possession and the claim for relief from forfeiture since there was no appeal from his order. The payment of all the other charges and rates made it clear that the only remaining issue was the claim for mesne profits. The learned Judge himself recognised this but appears not to have taken it into account or at least not to have given it the weight which it ought to have been given in exercising his discretion.

In regarding the defects in the notice of payment-in as precluding the respondents from being entitled to claim their costs and in failing to give sufficient weight to the factors which have been mentioned, the learned trial Judge failed to exercise his discretion as to costs. The Court of Appeal accordingly had jurisdiction to hear the appeal and came to a decision to which on all the material before it was entitled to come. If regard is had to the combination of the factors to which their Lordships have drawn attention, there being no other factors

indicating that the respondents ought to have been deprived of their costs, it seems to their Lordships that the discretion could only be exercised in favour of awarding the costs to the respondents.

This is not to say that defects in a notice of payment-in are always to be ignored. They may be such as to give reasonable grounds for a plaintiff being misled as to the true scope of the payment-in and a defendant who does not comply with the rules runs the risk of that being held against him so as to deprive him of the costs which he would normally get on a payment-in properly made.

That however is not this case.

For the reasons given their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs before the Board.

Also found at [1992] 4 CLJ 1784